IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1945

No. 1247

BALTIMORE & OHIO CHICAGO TERMINAL RAILROAD COMPANY, A CORPORATION,
Petitioner,

vs.

WILLIAM W. HOWARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND BRIEF IN SUPPORT THEREOF.

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STATUTES INVOLVED.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

STATEMENT.

Your petitioner, The Baltimore & Ohio Chicago Terminal Railroad Company, a corporation, prays for a writ of certiorari to review the order and judgment of the Appellate Court of Illinois, First District, entered November

6, 1945, confirming the judgment of the Circuit Court of Cook County, Illinois (June 2, 1944) in favor of the respondent, William W. Howard, and against petitioner for $50,000 on account of personal injuries sustained by said William W. Howard while in the employ of petitioner (R. 9, 139).

Application was made to review said order and judgment of the Appellate Court of Illinois, First District, on leave to appeal (discretionary with the Supreme Court of Illinois), which application was denied by the Supreme Court of Illinois, March 13, 1946 (R. 146), thus rendering said order and judgment of the Appellate Court of Illinois, First District, the highest court in the State of Illinois in which a decision could be had (*Western Union Telegraph Co.* v. *Crovo,* 220 U. S. 364, 55 L. ed. 498; *American Railway Express Co.* v. *Levee,* 263 U. S. 19, 68 L. ed. 140; *Chicago & Eastern Illinois R. Co.* v. *Industrial Commission,* 285 U. S. 296, 76 L. ed. 304).

The Opinion of the learned Appellate Court appears in the record herein at pages 121 to 139; and the petition of your petitioner for rehearing and reconsideration thereof (denied) appears at pages 140-144. Also, the said case is reported in 327 Ill. App. 83, 63 N. E. (2d) (Ill. App.) 774.

BASIS FOR JURISDICTION.

Statutes Involved.

The statute of Illinois on leave to appeal from the Appellate Court to the Supreme Court of the State is as follows:

Chap. 110, Par. 259.32(1), Smith-Hurd's Rev. Stat. 1945,

> "The party applying for leave to appeal from an Appellate Court to the Supreme Court shall file a peti-

> tion therefor in the Supreme Court, stating therein the reason and grounds of appeal * * * In case leave to appeal shall not be granted the record shall be returned forthwith to the Clerk of the Appellate Court."

Semble: Rule 32, Supreme Court of Illinois (Rules, 393 Ill. 11, Adv. Sheets).

The claim of respondent was based on Sec. 2 of the Safety Appliance Act (with petitioner claiming immunity herein thereunder), which said statute is as follows (Title 45, USCA, Railroads):

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of going in between ends of the cars."

Also, for petitioner:

> Sec. 344(b), 28 USCA, Judicial Code:
>
> "It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * or where is drawn in question * * * or where any title, right, privilege, or immunity is specially set up by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States * * *"

Facts.

Petitioner was a common carrier, respondent was a switchman employed by it, and it was stipulated on the trial that the parties were engaged in Interstate Commerce at the time of the injuries complained of (R. 19). Respondent had been in petitioner's employ 23 years (R.

19). He was the sole occurrence witness herein as it was pleaded by respondent.

On February 21, 1943, the date of the happening of the injuries to respondent, he was at work for petitioner in the McDonald Yard, near Chicago Heights, Illinois (R. 19, 20, 32). Respondent and his freight switching crew came into the yard with an engine and two cars (R. 32). They were going to couple the two cars on a twelve car cut which had been left earlier on track 1 in the McDonald Yard (R. 32, 33, 35).

Just prior to the accident, the engine was shoving a box car and a hopper car south on this track, with the engine headed north, and respondent rode the lead car at the southeast corner where there was a stirrup for his feet and a handhold (R. 35). This put him on the east, or the engineer's side (R. 34, 35).

Respondent said the movement first proceeded at about four or five miles an hour, but that when about fifteen car lengths from the standing cars, he gave the engineer a signal to reduce speed (R. 35); that the signal was given by holding an electric lamp out, which was a slow-up signal (R. 35); and that the engineer responded and slowed down to about three miles an hour (R. 35). At about four car lengths from the other cars, respondent said he stepped off his car and started to walk ahead toward the standing cut, and at a much faster rate than his cut was shoving back (R. 35). Respondent said that the knuckle on his car was closed, with no way to open the knuckle on his side (pinlifter), and that he did not know if the knuckle on the standing car was open or not, but if it was not, he was going to open it (R. 35, 36). Respondent preceded the moving cars to the standing car, and stepped up to it, and the knuckle was closed (R. 36).

Respondent said he took hold of the pinlifter on the standing car with his left hand and jerked, and it did

not come up; that he gave three jerks and it did not come up (R. 36); and that he turned to see where the cars following him were, and they were forty or fifty feet away at the time (R. 36).

Respondent then said that he stepped one foot across the rail, held the pinlifter up with his left hand and pulled on the knuckle with his right, and the pinlifter flew up sudden. He went off balance (R. 36, 45). Respondent said that he fell on his back in the center of the track (R. 36); that he fell back six or seven feet from the north end of the standing car (R. 36).

Respondent said that some part of the brake rigging underneath the trucks of his lead car struck him after he fell and knocked him out momentarily (R. 36, 45); that when he came too, he was on his back, with his head underneath the brake rigging and the car wheel standing on his pants cuff (R. 36); that his left arm was smashed where the car wheel ran down from elbow to hand (R. 36, 40).

Respondent said that he pulled on his pants leg for what seemed fifteen minutes, or quite a while (R. 37); that he got out beneath the trucks, and then walked down to the engine where the fireman came to his assistance (R. 37). At the engine, respondent said he pulled the pin and uncoupled the first car, and rode the engine's back footboard north to the caboose, which was some twenty-five or thirty car lengths back (R. 37).

The caboose with plaintiff was taken to Chicago Heights, where at 16th Street an auto was stopped, and respondent was taken in it to a hospital (R. 39). There his left arm was amputated (R. 40, 45).

Anthony Schramm, crew conductor, testified for respondent. He said that about two hours after the accident he tried the pinlifter in question a few times before it came up, and that when it did, it went way up (R. 22, 23, 26).

Also, he said he opened the knuckle by hand before the engine got in there and coupled the two cars on the twelve car cut (R. 23, 25). Switchman, Robert K. English, testified by deposition for respondent, and he said that after the accident he pulled on the pinlifter in question and the knuckle did not open (R. 28); that the cars were coupled up there and they went on their journey (R. 30).

Respondent's theory of recovery, and the heart of the complaint is (R. 4):

> "Plaintiff avers that in order to operate said pinlifter and to open the said knuckle he was compelled to step between the cars, and while in said position, as a direct and proximate result of defendants' failure to comply with Safety Appliance Act, as aforesaid, and to maintain efficiently operating safety devices as therein required, plaintiff was then and there thrown off his balance and to the ground between the rails, and his left arm was caught and run over and crushed by the said moving cars, and so injured that it was necessary to amputate it; and his head was struck violently * * *"

In short, on the charge, the evidence is that the pinlifter did not work from the outside of the rails to open the knuckle on the standing car which respondent wanted to open for a coupling, and he put one foot over the rail and pulled both on the pinlifter and the knuckle, and the pinlifter came up suddenly. He was thrown off balance to the track. He fell back six or seven feet back from the north end of the standing car. In that position, the lead car's brake rigging struck him in the head, and also its car wheel ran down his arm from elbow to hand to crush it; also the wheel pinned respondent to the rail for a time. These are the injuries sued for.

Also, it is respondent's testimony that his cut movement started at about four or five miles an hour, and slowed to three miles an hour in response to a signal from respondent; that he walked to the standing car ahead of the moving cut, and once there he turned to see where the cut was that

was following him, and it was forty or fifty feet away when he stepped across the rail to take hold of the coupler knuckle. Respondent further said the hopper car's trucks struck him after he fell (R. 45).

It is petitioner's contention that there was no causal relation between the delinquent coupler and respondent's injuries, for that the intervening car movement was the nonwrongful cause of the actual injuries sued for; and that in this connection, to attempt to isolate the defective coupler as the sole proximate cause of the injuries pretermitted testimony on the facts in the movement.

PROCEEDINGS IN THE ILLINOIS COURTS.

Respondent's action was filed in the Circuit Court of Cook County, Illinois, September 14, 1943 (R. 1). In a trial before court and jury there was a verdict and judgment in respondent's (plaintiff's) favor in the sum of $50,000 June 2, 1944 (R. 108). Petitioner appealed therefrom to the Appellate Court of Illinois, First District August 8, 1944 (R. 16).

The Appellate Court of Illinois, First District affirmed the said judgment of the Circuit Court of Cook County, Illinois, November 6, 1945 (R. 139), and denied a petition of petitioner for a rehearing filed November 15, 1945 (R. 140-144), on November 20, 1945 (R. 145).

Thereafter, on December 4, 1945 the said Appellate Court stayed its mandate in the cause pending filing a petition for leave to appeal from said judgment of the Appellate Court in the Supreme Court of Illinois (R. 145). On March 13, 1946, the Supreme Court of Illinois denied the petition of your petitioner for leave to appeal from said judgment of the Appellate Court (discretionary), to leave the judgment final herein, and made said Appellate Court of Illinois, the highest court in Illinois in which a decision could be had in the cause. Its mandate was stayed herein March 26, 1946, pending application for writ of certiorari in the Supreme Court (R. 148).

On the trial, at the close of all the evidence for plaintiff (respondent) and petitioner (defendant), defendant (petitioner) presented a written motion and accompanying instruction to find it not guilty, which the court denied and refused (R. 92, 93); and thereafter on June 9, 1944, defendant (petitioner) filed its motion for judgment notwithstanding the verdict and in the alternative for new trial (R. 108), which said motions were denied and overruled (R. 114).

Question Involved.

Where the direct, proximate cause of injuries was alleged to be a violation of the Safety Appliance Act requiring coupler on a standing car to couple automatically by impact without necessity of going between cars, may injuries coming directly and immediately from a car moving in for coupling be included thereunder when the car movement itself was left a disconnected, and nonwrongful act, in the theory for recovery?

Reasons for Granting Writ of Certiorari.

I.

The Appellate Court of Illinois, First District, has decided a Federal question of substance, that of removing causal relation between delinquency and injury in the Safety Appliance Act, in a way probably not in accord with the applicable decisions of this Court, including *Lang* v. *New York Central R. Co.*, 255 U. S. 455, and *Atchison, Topeka & S. F. R. Co.*, 281 U. S. 351, in which the Court has held that necessarily there must be a causal relation between the fact of delinquency and the fact of injury to sustain an action under the Safety Appliance Act, and under the Federal Employers' Liability Act. Said order and judgment of the Appellate Court of Illinois, First District, is also probably not in accord with

the decisions of this court in *Louisiana Mutual Ins. Co.* v. *Tweed*, 7 Wall. 44 and *Atchison, Topeka & S. F. Ry. Co.* v. *Calhoun*, 212 U. S. 1, that an alleged cause must be considered as too remote if a new power or force has intervened sufficient to stand as the cause of the accident; to, probably, *Milwaukee & St. Paul R. Co.* v. *Kellogg*, 94 U.S. 469, for a proposition that even natural and probable consequences of a wrongful act or omission are not chargeable to misfeasance or nonfeasance where there is a sufficient and independent cause operating between the wrong and injury; and to, probably, *Gt. Northern Ry. Co.* v. *Wiles*, 250 U.S. 444, where a pulled drawbar was held to be a condition merely, and failure to signal a stop to an on-coming train the proximate cause of fatal injuries in a collision to the non-signaler. Also, the instant case probably presents the converse of the Goneau case for decision, *Minneapolis, etc. Ry. Co.* v. *Goneau*, 269 U. S. 406, where injuries in a fall over the side of an open bridge, while manipulating a defective coupler to effect a coupling, were held incidental thereto, with no intervening and disconnected act present in car movement to give the injuries, separately, as is also involved in the instant case.

II.

The question presented is in no sense technical, for to ignore car movement as the direct and immediate cause in the injuries sued for is to pretermit testimony from enginemen in the movement on fault, or freedom from fault therein, and to present respondent as the sole occurrence witness on a defective coupler fragment as a whole case to distort the Safety Appliance Act.

Moreover, petitioner submits, that it may not be assumed that the car movement was a wrongful and concurring act with the defective coupler in the absence of an allegation that it was, and in the absence of an opportunity, at least, for enginemen to testify thereon in their own, and petitioner's, defense.

PRAYER FOR WRIT.

Your petitioner therefore respectfully prays that a writ of certiorari be issued out and under the seal of this Honorable Court, directed to the Appellate Court of Illinois, First District, commanding said court to certify and send to this Court a full and complete transcript of the record and proceedings in said Appellate Court of Illinois, First District, in this cause entitled *William W. Howard, Appellee* v. *The Baltimore & Ohio Chicago Terminal Railroad Company, a corporation, Appellant*, No. 43279, to the end that this cause may be reviewed and determined by this Honorable Court, and that the said order and judgment of the Appellate Court of Illinois, First District, may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

THE BALTIMORE & OHIO CHICAGO TERMINAL RAILROAD COMPANY, A CORPORATION.

By EDWARD RAWLINS,
Its Counsel.

JAMES F. WRIGHT,
FAY WARREN JOHNSON,
Of Counsel.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The case was erroneously submitted to the jury under the Safety Appliance Act.

A.

There was no causal relation between the delinquent coupler and respondent's injuries.

Lang v. *New York Central R. Co.*, 255 U. S. 455.
Atchison Topeka & Santa Fe v. *Toops*, 281 U. S. 351.
Milwaukee & St. Paul R. Co. v. *Kellogg*, 94 U.S. 469.
Louisiana Mutual Ins. Co. v. *Tweed*, 7 Wall. 44, 19 L. ed. 65.
Great Northern Ry. Co. v. *Wiles*, 240 U. S. 444.
Minneapolis, etc., Ry. Co. v. *Goneau*, 269 U. S. 406.
Devine v. *Calumet River R. R. Co.*, 259 Ill. 449.

B.

The intervening car movement became the non-wrongful proximate cause of respondent's injuries.

Louisiana Mutual Ins. Co. v. *Tweed*, 7 Wall. 44.
Milwaukee & St. Paul R. Co. v. *Kellogg*, 94 U.S. 469.
Atchison, Topeka & S. F. R. Co. v. *Calhoun*, 212 U. S. 1.
Great Northern Ry. Co. v. *Wiles*, 240 U. S. 444.
Devine v. *Calumet River R. R. Co.*, 259 Ill. 449.
Cf. *Keddy* v. *Atchison, Topeka & S. F. R. Co.*, 28 F. (2d) 952, cert. den. 279 U. S. 856, 73 L. ed. 997.

In the *Lang* case above cited (255 U. S. 455, 65 L. ed. 729, 731), it was stated, in speaking of the Safety Appliance Act relied on by respondent, that:

> "But necessarily there must be a causal relation between the fact of delinquency and the fact of injury and the case so declares" (*L. & N. R. Co.* v. *Layton*, 243 U. S. 617).

And also, for the Federal Employers' Liability Act, it was stated in the *Toops* case above cited (281 U. S. 351, 74 L. ed. 896, 899):

> "But proof of negligence alone does not entitle plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury."

In point here, we think, is *Devine* v. *Calumet River R. R. Co.*, 259 Ill. 449. It was a case as well where the only negligence charged was that of a failure to comply with Federal and State statutes in regard to automatic couplers. The coupler there would couple by impact but it had no lever on the side to uncouple it without the necessity of men going between the cars so that literally, the device did not comply with the statutes. In a flying switch, where cars were kicked loose from an engine after the pin was pulled, the engine was derailed when it was reversed to stop it, that together with a bad track. In the derailment the employee in the uncoupling was caught for fatal injuries.

The Illinois Supreme Court held in the foregoing case that the violation of the Safety Appliance Acts charged in the declaration (solely) must have been the proximate cause of the injury to authorize recovery, and that it was not sufficient that the violation may have brought about a condition which made the injury possible by the intervention of other "disconnected and immediate causes." It held also that a verdict should have been directed in

the case, which is the same relief as asked for in the instant case (Tr. 8, 92).

It is clear here, too, that the car movement in the instant case was a disconnected cause even in the pleader's own theory of the case. Cf. *Atchison, Topeka & S. F.* v. *Keddy,* 28 F. (2d) 952 (C. C. A. 9th), cert. den. 279 U. S. 856, 73 L. ed. 997, the closest case cited by the Illinois Appellate Court but misunderstood by it. There an employee was adjusting a defective knuckle, and a cut of cars was moved in on him without signal. The Circuit Court said, page 952:

> "He alleged in his complaint that the proximate cause of the accident was the negligence of defendant in backing the cars as aforesaid, and in negligently using an old, defective, and unsound drawbar knuckle, to operate which the plaintiff had to go between said cars."

Also in this connection, *Minneapolis, etc., R. Co.* v. *Goneau,* 269 U. S. 406, referred to by petitioner as the converse of the instant case, a freight train had come apart on a bridge due to a defective coupler. In an effort to recouple the cars, the employee tugged on the draw bar carrier iron, and on the last time, it came "easy," and he went off balance, and on over the side of the bridge to the ground below for the injuries complained of—but in the instant case there was the intervention of an independent car movement to give respondent the injuries sued for.

Moreover, wrong, dereliction, or negligence may not be assumed in the latter movement, petitioner contends, in order to submit the case for plaintiff under the Safety Appliance Act.

To conclude with the point that the undisputed evidence in this case discloses that the defective coupler was not

the sole proximate cause of respondent's injuries, petitioner submits that the rule for a self-sufficient second cause is as stated in *Atchison, Topeka & Santa Fe R. Co.* v. *Calhoun,* 213 U. S. 1, 53 L. ed. 671, 674:

> "The law, in its practical administration, in cases of this kind regards only proximate or immediate, and not remote, causes, and in ascertaining which is proximate and which is remote, refuses to indulge in metaphysical niceties. Where, in the sequence of events, between the original default and the final mischief an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause, and the other as the remote cause. *Louisiana Mut. Ins. Co.* v. *Tweed,* 7 Wall. 44, 19 L. ed. 65, 67."

In *The Louisiana Mutual Ins. Co.* v. *Tweed,* 7 Wall. 44, 19 L. ed. 65, in speaking of the doctrine of proximate and remote causes as it had arisen in a great variety of cases, the Court said, page 67:

> "One of the most valuable of the *criteria* furnished us by these authorities, is to ascertain whether a new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself, sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

Respectfully submitted,

EDWARD W. RAWLINS,
Counsel for Petitioner.

JAMES F. WRIGHT,
FAY WARREN JOHNSON,
Of Counsel.

IN THE

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ANSWER OF THE RESPONDENT TO THE PETITION FOR CERTIORARI

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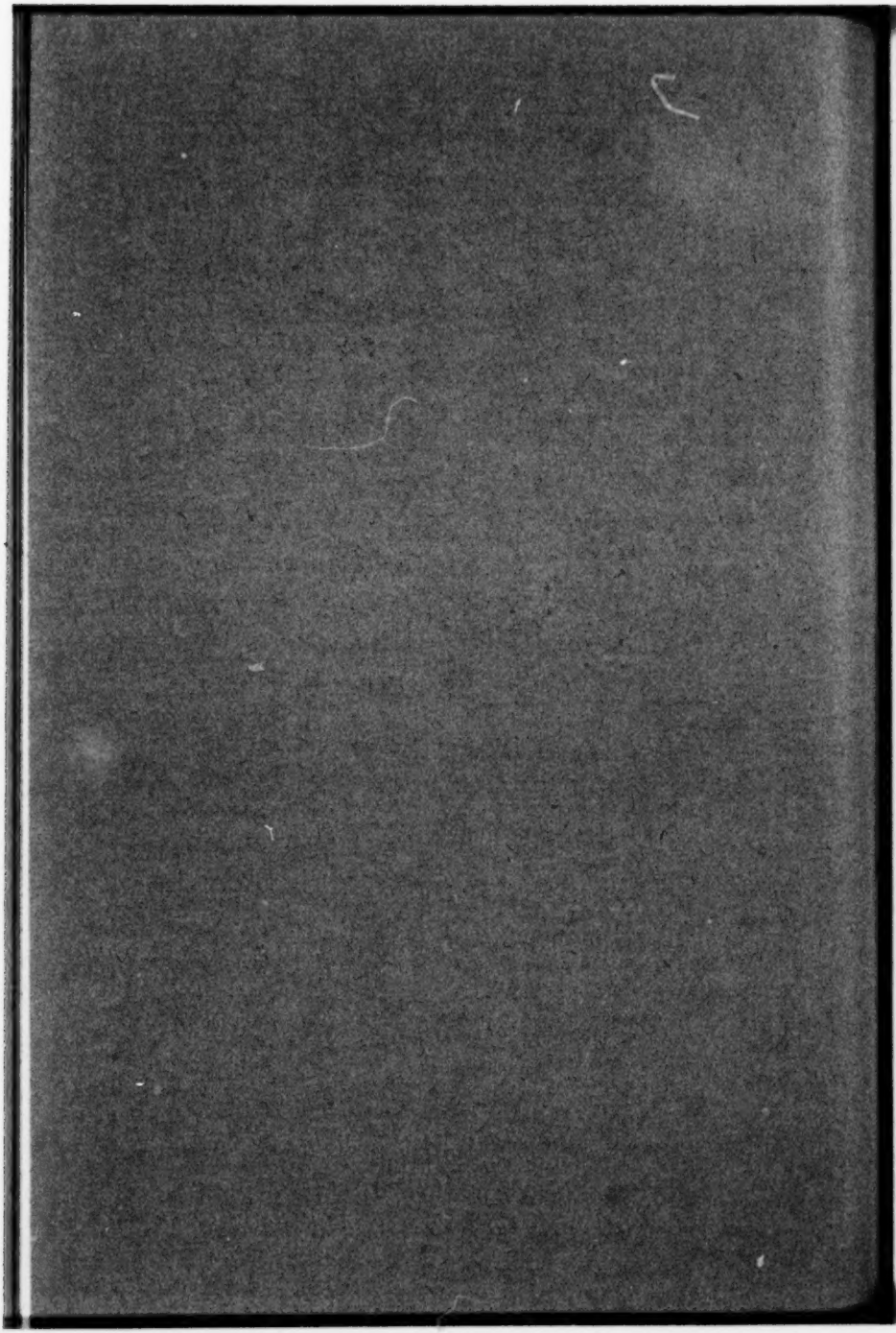

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ANSWER OF THE RESPONDENT TO THE PETITION FOR WRIT OF CERTIORARI.

The opinion of the Appellate Court of Illinois in this case is reported in 327 Ill. App. 83, 63 N. E. (2) 774, and appears in the record herein at pages 121 to 139.

STATEMENT.

Respondent's action is based upon the Employers' Liability Act (45 U. S. C. A. Secs. 51, 53) and Section 2 of the Safety Appliance Act (45 U. S. C. A. Sec. 2). Respondent, a switchman, was run over while attempting to open a knuckle on a standing freight car so that a moving car could be coupled to it. After several unsuccessful attempts to operate the pin lifter, he stepped with one foot between the rails and pulled upward on the pin lifter (which normally hangs down in a vertical position and when functioning properly opens the knuckle when pulled upward eight or ten inches to an angle of about 45 degrees) with his left hand, while pulling on the knuckle with his right. The pin lifter suddenly flew up to a position much higher than normal—three inches above horizontal—and respondent was thrown off balance and fell backward between the rails. Before he could regain his feet he was struck and run over by the approaching car which he was attempting to couple to the standing car (R. 122).

It was stipulated below that the parties were engaged in interstate commerce at the time of the accident and injury, and petitioner's violation of the Safety Appliance Act is conceded in this court. The sole question here involved is whether such violation (the use of a car with a defective coupler) was a proximate cause of respondent's injuries, petitioner contending that the necessary causal relation did not exist because the movement of the car which injured respondent was an intervening agency which became the proximate cause of the injuries.

SUMMARY OF ARGUMENT.

The defective coupler made it necessary for respondent to go between the cars to open the coupler so that the moving cars could be coupled onto the standing cars. The sudden yielding of the pin lifter which he was attempting to manipulate caused him to fall directly in front of the moving cars, which ran over and injured him. The use of the car with the defective coupler and the movement of the cars which injured respondent were parts of a single coupling operation, and such use and movement were directly related. The coupling operation could not be separated into its component parts in order to regard the car movement as an independent intervening cause of respondent's injuries. The violation of the Safety Appliance Act was the direct and proximate cause of his falling in front of and being run over by the moving cars.

ARGUMENT.

I.

The Employers' Liability Act and the Safety Appliance Act are in pari materia. An action arises under the Employers' Liability Act when the injury results in whole or in part from the employer's negligence, and a violation of the Safety Appliance Act is negligence within the meaning of the Liability Act.

Spokane and Inland E. R. R. v. *Campbell*, 241 U. S. 497.

San Antonio and A. P. Ry. Co. v. *Wagner*, 241 U. S. 476.

II.

The violation of the Safety Appliance Act need not be the sole cause in order that an action may lie; it is sufficient if it is one of the proximately contributing causes of the injury.

Spokane and Inland E. R. R. v. *Campbell*, 241 U. S. 497.

Minneapolis etc. Ry. v. *Goneau*, 269 U. S. 406.

Swinson v. *Chicago, St. P., M. and O. Ry.*, 294 U. S. 529.

Davis v. *Wolfe*, 263 U. S. 239.

III.

Petitioner's violation of the Safety Appliance Act was a proximate cause of respondent's injuries; the movement of the cars which injured him was not an independent intervening cause.

Chicago G. W. R. R. v. *Schendel*, 267 U. S. 287.
Grand Trunk Ry. Co. v. *Lindsay*, 233 U. S. 42.
Minneapolis etc. Ry. v. *Goneau*, 269 U. S. 406.
Swinson v. *Chicago, St. P., M. and O. Ry.*, 294 U. S. 529.
Davis v. *Wolfe*, 263 U. S. 239.
Atlantic City R. R. Co. v. *Parker*, 242 U. S. 56.
Tiller v. *Atlantic Coast Line*, 323 U. S. 574.
Tennant v. *Peoria and P. U. Ry. Co.*, 321 U. S. 29.
Anderson v. *B. and O. R. Co.*, 89 F. (2) 629 (C. C. A. 2), cert. den. 302 U. S. 696.
Eglsaer v. *Scandrett*, 151 F. (2) 562 (C. C. A. 7).
Chicago M. and St. P. Ry. Co. v. *Voelker*, 129 F. 522 (C. C. A. 8).
Erie R. Co. v. *Russell*, 183 F. 722 (C. C. A. 2).
Atchison, T. and S. F. Ry. Co. v. *Keddy*, 28 F. (2) 952 (C. C. A. 9), cert. den. 279 U. S. 856.
Philadelphia and R. Ry. Co. v. *Auchenbach*, 16 F. (2) 550 (C. C. A. 3).

In order to bring himself within the protection of the Safety Appliance Act, it is only necessary for respondent to show that his injury resulted in part from petitioner's violation of the Safety Appliance Act. It is clear that the violation caused him to go between the cars and to fall directly in front of the car which ran over him. Unless it can be said that this movement of cars was an intervening cause which broke the chain of causation between the

violation and the injury, respondent's right to recovery cannot be denied.

The movement cannot be regarded as independent of the use of the defective car, because respondent's attempt to manipulate the coupler was for the immediate purpose of enabling the moving cars to be coupled on. The use of the coupler and the movement were parts of a single operation, and it would be highly artificial to separate the component parts of this operation for the purpose of regarding the moving cars as an independent agency. A similar argument was rejected in *Chicago, M. and St. P. Ry. Co.* v. *Voelker,* 129 F. 522 (C. C. A. 8), in which it was urged that the preparation of a coupler for impact was to be regarded as distinct from the act of coupling; in *Erie R. Co.* v. *Russell,* 183 F. 722, in which it was contended that the movement of the cars which caught and injured the employee while he was adjusting a coupler was an intervening cause; and in *Atchison, Topeka and Santa Fe R. Co.* v. *Keddy,* 28 F. (2) 952, cert. den. 279 U. S. 856, where the employee was caught and crushed while adjusting a coupler and it was contended that the defective coupler was not the cause of the accident.

This court has held, in *Chicago G. W. R. R.* v. *Schendel,* 267 U. S. 287, that a brakeman's violation of the rules in failing to notify his engineer before going between cars was not an intervening cause of the injury; and in *Grand Trunk Ry. Co.* v. *Lindsay,* 233 U. S. 42, that a switchman's giving a come ahead signal to the engineer as he stepped between cars to manipulate a defective coupler, was at most an act of negligence concurring with defendant's violation of the Safety Appliance Act to produce the injury, and not the proximate cause of it so as to defeat a recovery under the act.

Even where the car movement causing the injury has no relation to the violation of the act it may not be an intervening cause. This is illustrated by *Anderson* v. *B. and O. R. Co.*, 89 F. (2) 629 (C. C. A. 2), cert. den. 302 U. S. 696, where a fireman was killed by an engine on an adjacent track while he was standing alongside his engine attempting to determine why its sanding apparatus was not functioning, and in an action for violation of the Boiler Inspection Act it was held that the question of proximate cause was for the jury.

The implication of petitioner's argument is that liability for violation of the Safety Appliance Act cannot arise unless the defective condition of the coupler itself causes the movement of the cars which is the final injuring force, as in *Minn. and St. Louis R. R. Co.* v. *Gotschall*, 244 U. S. 66, and *Louisville and Nashville R. R. Co.* v. *Layton*, 243 U. S. 617. If it were necessary that the coupler itself supply the immediate injuring force, recovery would have been denied in all cases in which the injury was immediately produced by the movement of cars, or, as in *Minneapolis etc. Ry.* v. *Goneau*, 269 U. S. 406, by contact with the ground.

It is difficult to conceive of a case in which the violation of the Safety Appliance Act was a more direct cause of the injury than it was in the instant case. The defective condition of the coupler made it necessary for respondent to go between the cars, and caused him to lose his balance and fall in front of the moving car, which immediately ran over him. It is of no significance that respondent was run over some six or seven feet from the end of the standing car (R. 124) rather than crushed against it. The injuring force was the same and caused the harm solely because the defective coupler placed him in its path. The move-

ment of the cars was at most a concurring proximate cause of the injuries. It made no difference whether this movement was negligent or not, since it was merely a concurring cause, and respondent was not required to, and did not, plead or attempt to prove that it was negligent.

Petitioner's argument, based on *Atchison, Topeka and S. F.* v. *Keddy,* 28 F. (2) 952 (C. C. A. 9), cert. den. 279 U. S. 856, seems to be that the car movement was a "disconnected cause" (Petition p. 13) because it was not alleged to be negligent and could not be assumed to be so. We think no argument is necessary to demonstrate that the question of negligence has nothing to do with causal relation. The car movement was no more or less an intervening cause if it was careful than if it was negligent.

Lang v. *New York Central R. Co.,* 255 U. S. 455, and *Great Northern Ry. Co.* v. *Wiles,* 240 U. S. 444, as well as other cases cited by petitioner, are not in point because in none of them was the employee injured while attempting to adjust a coupler for the purpose of making an immediate coupling.

The language of this court in *Minneapolis, etc. Ry. Co.* v. *Goneau,* 269 U. S. 406, in discussing the question of proximate cause, is applicable to the instant case. The court there said:

> "Since he was injured as a result of the defect in the coupler, while attempting to adjust it for the purpose of making an immediate coupling, the defective coupler was clearly a proximate cause of the accident as distinguished from a condition creating the situation in which it occurred."

In *Atlantic City R. R. Co.* v. *Parker,* 242 U. S. 56, a case in which the employee brought suit to recover for the loss of an arm crushed while he was coupling a tender to a car, the court said, at page 58:

> "If there was evidence that the railroad failed to furnish 'such couplers coupling automatically by impact' as the statute requires (*Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 18, 19), nothing else needs to be considered."

The violation is conceded in the instant case, the injury occurred while respondent was attempting to adjust the coupler for the purpose of making an immediate coupling, and we think nothing else needs to be considered.

No ground exists for issuance of the writ of certiorari in this case, and we respectfully submit that the petition should be denied.

Respectfully submitted,

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Respondent.